

ORIGINAL

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Review of the Commission's Regulations)
Governing Programming Practices of)
Broadcast Television Networks and Affiliates)
)
47 C.F.R. § 73.658(a), (b), (d), (e) and (g))

MM Docket No. 95-92

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To: The Commission

COMMENTS OF SINCLAIR BROADCAST GROUP, INC.

SINCLAIR BROADCAST GROUP, INC.
2000 West 41st Street
Baltimore, MD 21211
(410) 467-4545

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SUMMARY

As mandated by the Communications Act, the system of television broadcasting in our nation is a system of individual stations, each licensed to a specific community and each responsible for serving the needs, interests, and concerns of that community. Fundamental to this principle of localism is the notion that the task of responding to the needs and interests of a station's community of license is solely the duty of the licensee. That duty may not be delegated to anyone else, including any entity from which the licensee obtains programming.

At stake in this proceeding is the question of whether it should remain the prerogative of local television licensees to determine the programming that best responds to the needs and interests of their local viewers, or conversely, whether it should be the task of national networks to decide how viewers in thousands of local communities are to be served. The right to reject rule, the time option rule, and the exclusive affiliation rule are the remaining regulations that protect a television licensee's freedom to program its station to best serve its local viewing public against intrusion from the national television networks. The Commission, however, now proposes modifications of these rules that will lead to further usurpation by the networks of their affiliates' individual duties and obligations to serve the needs of their local communities.

The networks do not need the additional advantages that the Commission's proposals would confer on them. Whatever might be the extent of their continued dominance in other markets, the networks still possess powerful economic leverage over their local affiliates. This is because network affiliation, with its ability to provide a cost-effective source of programming

and create valuable brand-name identity, is often the difference between success and failure for a local television station. A loss of network affiliation has a devastating impact on the affiliate. Conversely, in all but the smallest markets a network unhappy with its current affiliate can simply take its affiliation to another station in the market. Indeed, the networks have already taken full advantage of their bargaining power over affiliates, as well as prior Commission deregulation of the network/affiliate relationship. They now can, and do, demand ten-year affiliation commitments, force affiliates to clear new network programming in previously non-network dayparts, and impose substantial monetary penalties or termination of affiliation for non-clearance or preemption. The networks simply do not need to be able to further constrain affiliates' rights to reject their programming, to disrupt affiliates' program acquisition processes by "optioning" time, or to ban their affiliates from clearing programs from other networks.

Accordingly, Sinclair urges the Commission to retain the right to reject rule, the time option rule, and the exclusive affiliation rule in their present form. These are the core rules that remain to protect affiliate autonomy over programming decisions from intrusion by the national networks. The Commission's proposals to modify these rules are not necessary for the health of the networks. They will, however, severely undermine the principle of localism that underlies broadcast regulation. Additionally, the dual network rule should be retained intact, as ownership by a single entity of more than one television network will further erode whatever small bargaining power a local television station may continue to possess vis-a-vis its affiliated network.

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COMMENTS OF SINCLAIR BROADCAST GROUP, INC.

Sinclair Broadcast Group, Inc. ("Sinclair") hereby submits its Comments on the Notice of Proposed Rule Making in the above-captioned proceeding, FCC 95-254 (released June 15, 1995) ("NPRM").^{1/} Sinclair shows in these Comments that the right to reject rule, the time option rule, and the exclusive affiliation rule -- each of which has at its core the protection of a licensee's nondelegable duty to program its station in the manner it deems most responsive to the needs and interests of the viewers in its particular service area -- should be retained intact. Notwithstanding the changes in the video marketplace that have occurred in recent years, the national broadcast television networks continue to wield tremendous power over their affiliated television stations.

^{1/} The NPRM set August 28, 1995 as the date for filing comments. By an Order Granting Extension of Time of the Chief, Mass Media Bureau, DA 95-1711 (released August 3, 1995), the comment deadline was extended to September 28, 1995. By a second Order Granting Extension of Time, DA 95-1970 (released September 14, 1995), the comment deadline was extended once more, to October 28, 1995. That date is a Saturday, and accordingly, these Comments are timely by virtue of the fact that they are being filed on the first business day after October 28.

Absent retention of the rules designed to protect affiliate autonomy in their current form, the networks can, and will, intrude upon the right of television licensees to themselves determine the programming best suited to meet the needs and desires of viewers in the markets they serve. This will impede the duty of local broadcast licensees to serve the particular needs and interests of their local communities, undermining the core concept of localism on which the Communications Act's scheme of broadcast regulation is based.

Introduction

1. It is a bedrock principle of the Commission's regulatory scheme that a broadcast licensee has a nondelegable duty to program its station in the public interest:

Broadcasting licensees must assume responsibility for all material which is broadcast through their facilities. . . . This duty is personal to the licensee and may not be delegated. He is obligated to bring his positive responsibility affirmatively to bear upon all who have a hand in providing broadcast matter for transmission through his facilities so as to assure the discharge of his duty to provide [an] acceptable program schedule consonant with operating in the public interest in his community.

Report and Statement of Policy re: Commission en banc Programming Inquiry, 44 F.C.C. 2303, 2313-14 (1960).

2. This fundamental notion has remained intact for decades. Thus, the Commission has rejected agreements between broadcasters and citizens that have infringed on the licensee's responsibility to make independent programming decisions. See Zenith Radio Corp., 42 R.R.2d 468 (1978); Twin Cities Broadcasting, Inc., 42 F.C.C.2d 1091 (1973). In 1980, when the Commission changed its policy to approve time brokerage agreements, it nonetheless emphasized that this policy modification did "not diminish the licensee's ultimate responsibility for programming broadcast over his facilities." Policy Statement on Part-Time Programming, 82

F.C.C.2d 107, 109 (1980). More recently, in approving extended time brokerage arrangements, or “LMAs,” the Commission has required that the brokered station maintain complete control over the programming supplied, including the absolute discretion to preempt or reject programming it deems not to be in the public interest. See, e.g., Peter D. O’Connell, Esq., 6 FCC Rcd 1869 (M.M. Bur. 1991).

3. At the heart of this fundamental Commission policy -- the right and duty of a licensee itself to determine the programming that will best serve the needs and tastes of its viewers -- is the concept of localism for which Congress provided in the Communications Act. See 47 U.S.C. § 307(b). Under the Act, broadcast channels are assigned, and licenses are granted, to specific communities, not simply “the United States.” While there are certainly many issues and concerns common to the nation as a whole and deserving of coverage on every broadcast station in every community, the holder of a broadcast license is not primarily charged with serving national needs and interests. Instead, the licensee’s core responsibility is to respond to the needs and interests of the particular community it is licensed to serve.

4. It cannot be debated that national broadcast networks play a valuable role in ensuring that all the citizens of the United States have access to coverage of events of national importance. However, programming provided by national networks is by definition incapable of fulfilling a broadcaster’s primary duty as a licensee: to air programming that addresses the needs and issues of concern to its specific community of license. Only the licensee can perform that task. The Commission’s rules governing television network/affiliate relationships therefore ensure, among other things, that as between individual television station licensees and the national networks with which they are affiliated, programming control resides in the licensee -- the only party capable of serving local needs and interests. Indeed, as the NPRM observes, a

primary objective of the Report on Chain Broadcasting, Docket No. 5060 (May 1941), which adopted the network rules at issue in this proceeding, was “[t]o ensure that licensees retain sufficient control over their stations to fulfill their obligation to operate in the public interest.” NPRM, para. 6.

5. As the owner (through various subsidiaries) of seven UHF television stations, each of which is affiliated with a national broadcast network,^{2/} Sinclair strongly supports a regulatory scheme which protects its freedom to program and operate its stations in the manner it believes will best serve the needs and interests of its stations’ local viewers, and inhibits national television networks from intruding upon that freedom.^{3/} Three of the network/affiliate rules at issue in this proceeding -- the right to reject rule, the time option rule, and the exclusive affiliation rule -- are specifically designed to further this objective. The right to reject rule guarantees affiliate autonomy over programming decisions by requiring that television network affiliation agreements afford the affiliate the right to reject network programs that the station reasonably believes are “unsatisfactory or unsuitable or contrary to the public interest,” and to substitute programs that the station believes to be of greater local or national importance. The time option rule prohibits a television network from intruding upon stations’ program scheduling

^{2/} At present, six of Sinclair’s television stations -- WPGH-TV, Pittsburgh, Pennsylvania; WBFF(TV), Baltimore, Maryland; WLFL(TV), Raleigh, North Carolina; WTTE(TV), Columbus, Ohio; WTVZ-TV, Norfolk, Virginia; and WTOO(TV), Birmingham, Alabama -- are affiliates of the Fox network. The remaining Sinclair station, WCGV-TV, Milwaukee, Wisconsin, is an affiliate of the United Paramount Network (“UPN”).

^{3/} Sinclair, for example, is a member of the Broadcasters Coalition, which has filed comments and reply comments in MM Docket No. 95-90 urging the Commission to retain the network advertising representation rule and the network control of station advertising rate rule, which promote affiliate autonomy by forbidding the networks from acting as advertising reps for their affiliates and from dictating their affiliates’ non-network advertising rates.

processes by “optioning” -- i.e., reserving in advance -- blocks of time on an affiliated station for programming the network may or may not supply in the future. The exclusive affiliation rule operates to promote affiliate freedom in choosing among the maximum amount of programming sources by barring affiliation agreements that prevent the affiliate from broadcasting the programming of another network.

6. The NPRM reaffirms that the goal of protecting a licensee’s control of its station “continue[s] to be relevant in today’s marketplace.” NPRM, para. 7. Yet the Commission now proposes substantial modifications to the core rules designed to protect the autonomy of licensees against intrusion by their affiliated television networks. The Commission proposes to retain the right to reject rule, but “to clarify that the rule may not be invoked based solely on financial considerations.” NPRM, para. 25. Additionally, the Commission proposes to rescind its prohibition on time optioning by a network, and instead allow such optioning subject to a predefined notice period. NPRM, para. 32. Furthermore, the Commission proposes to eliminate, “at least in large markets,” its rule prohibiting exclusive network affiliations. NPRM, para. 37.

7. Sinclair urges the Commission to retain the right to reject rule, the time option rule, and the exclusive affiliation rule in their present form. These are the core regulations designed to prevent the national networks from intruding upon the right and duty of local television licensees to select the programming they deem most responsive to their local viewers.^{4/} For a local television broadcaster, affiliation with a national network continues to be the difference between success on one hand, and marginality or failure on the other. As a result, the

^{4/} As discussed infra, Sinclair also supports the retention of the dual network rule, because whatever limited bargaining power an affiliate may continue to possess in dealing with its network would be further constrained by allowing an entity to own more than one network. Sinclair takes no position on the network territorial exclusivity rule, which, as the NPRM points out, does not address network dominance over affiliates.

networks continue to possess tremendous power over their affiliated stations. They have already taken advantage of prior relaxations of the network/affiliate rules, and now customarily demand affiliate commitments of ten years in duration. They are already able to require that affiliates clear programming that their network develops in previously non-network dayparts, and to impose substantial monetary penalties and/or loss of affiliation on their affiliates for preempting network programs. The networks do not need the additional bargaining power they would obtain from being able to further restrict their affiliates' right to reject network programming, to "option" time on their affiliates, and to bar their affiliates from taking programs from any other network. Put simply, the Commission's proposals for modification of the right to reject rule, the time option rule, and the exclusive affiliation rule are unnecessary to protect networks. The proposed modifications would take broadcast regulation another step away from the concept of localism on which it was premised, placing the fundamental prerogative of broadcasters to determine the programming that best serves their local viewers further into the hands of the national networks.

Discussion

I. The Deprivation of a Broadcast Network Affiliate's Programming Freedom Harms Diversity by Reducing the Flow of Locally Responsive Programming

8. Noting that the network/affiliate rules at issue in this proceeding were intended, among other things, to "give stations control over the video programming they broadcast, so that incumbent networks could not unduly influence the 'flow of programs from producers to listeners,'" the NPRM posits that such rules "may no longer be necessary because of the video

programming alternatives available to consumers.” NPRM, para. 9. Aside from the fact that broadcast stations remain the primary outlet for video programming to viewers,^{5/} however, the fact that other video distribution technologies exist is largely beside the point. Even if it could be said that there are sufficient “pipelines” of video programming to consumers other than broadcast television, affording television networks greater opportunities to intrude upon their affiliates’ programming freedom would impede the “flow” of local programming -- the type of programming that alternative technologies are ill-equipped to provide. When affiliates decide to preempt shows in their network schedules, such preemption normally occurs in favor of programs that the affiliate has determined are of greater interest or concern to viewers in its local service area. This type of locally responsive programming -- whether it be local news or public affairs, specialized programming of particular concern to a station’s service area (such as a farm report in an agricultural community), or a fundraising telethon for the benefit of a local charity -- is precisely the type of programming that cable networks, DBS, and wireless cable, which are

^{5/} According to Nielsen data contained in an economic study recently commissioned jointly by ABC, CBS and NBC in a separate rulemaking proceeding, broadcast television stations (ABC, CBS, NBC, Fox, independent, and public) account for a combined audience share of 77 among television households (Mon-Sun, 7 a.m.-1 a.m.) -- and an aggregate share of 83 during the critical Monday-Friday prime time viewing hours of 8:00-11:00 p.m. See Economists Incorporated, “An Economic Analysis of the Prime Time Access Rule,” prepared on behalf of Capital Cities/ABC, Inc., CBS Inc., and National Broadcasting Company, Inc. and filed in MM Docket No. 94-123 (March 7, 1995), at 145, 151, Tables K-1 & K-7. Moreover, as the NPRM points out, nearly 34% of U.S. households still do not subscribe to cable. NPRM, para. 10. Other video distribution technologies such as DBS and wireless cable have not yet begun to scratch the surface in terms of penetration. DBS subscribership has been estimated at less than 2 million, and MMDS subscribership at only around 750,000. See Multichannel News, Aug. 14, 1995, p. 1; M. Hallinger, “Wireless Cable Ready for the World,” TV Technology, July 1995, p. 1. Indeed, the Washington Post has recently noted that “[i]n a world in which the number of ways to receive news and information seems to climb daily, newspapers and TV stations are still the biggest players around.” P. Farhi, “The Old Still Get the Gold,” Wash. Post, Jul. 26, 1995, at G-1.

unburdened by public interest obligations and generally operate on a national scale, cannot provide.

9. Unless the Commission is prepared to state that the concept of localism embedded in the Communications Act is no longer to be embraced, it cannot, as a matter of law or policy, undermine the right of television licensees to broadcast that programming which they deem to be of greatest interest to their local viewers. In short, it is not merely the “flow of programs” -- but, instead, the flow of the locally responsive programming that television broadcast stations are uniquely suited and obligated to provide -- that is impeded by allowing networks to intrude on the programming choices of their affiliates.

II. The Networks Possess Tremendous Economic Power Over Their Affiliated Stations, and Do Not Need Additional Opportunities to Intrude Upon the Programming Autonomy of Their Affiliates

10. The NPRM goes on to state that “[e]ven if we do not consider [other] multichannel programming sources in our analysis” -- which, as shown above, the Commission should not do -- “we believe that changes in the broadcast industry itself may have significantly altered the network/affiliate relationship.” NPRM, para. 11. The fact is, however, that the national television networks continue to possess substantial market power vis-a-vis their affiliates. Network affiliation is the crown jewel of a local television station -- the difference between success on one hand, and marginal performance or failure on the other. Network affiliation provides a station with a continuous stable flow of first-run programming in prime time and other dayparts, saving the station what would otherwise be substantial transactional and programming costs in filling its broadcast schedule. Equally important, affiliation with a popular

national network generates increased viewership and revenues for the station in non-network dayparts, enabling the station to reinvest its revenues in enhanced public service programming such as local news, public affairs, and children's shows. Network affiliation also allows the affiliate to create an identifiable brand name in the increasingly competitive television marketplace. This can be seen, for example, in the Washington, D.C. market, where the local affiliates of NBC, Fox, and UPN market themselves to the public, not by their call letters, but as "NBC4", "Fox 5", and "UPN 20".

11. Conversely, a station which loses its network affiliation is a station on the road to marginality, unprofitability, and possibly even extinction. The loss of a network affiliation -- and the cost-effective programming and brand identity that affiliation provides -- is a prospect that is genuinely feared by the affiliate. As a result, it is a tool by which a network can exercise enormous bargaining power over an affiliate.

12. This leverage is all the more significant because, in all but the smallest of markets, a network displeased with an affiliate in a given market can simply take its affiliation to another local station. The NPRM observes that the four largest networks (ABC, CBS, NBC and Fox) appear to have bargaining power over their affiliates in only 4% of television markets if it is assumed that the networks prefer to affiliate with VHF stations, but have bargaining power over affiliates in 103 markets (representing 84% of U.S. television households) if the market for affiliates is considered to encompass both VHF and UHF stations. It is no longer realistic, however, to assume that networks will affiliate only with VHF stations. The disparity between VHF and UHF stations has narrowed over time, particularly with the increased penetration of cable and the reemergence of must-carry rights. Equally important is the emergence of Fox, so that there are now at least four broadcast networks, and no more than three VHF stations, in most

markets. Thus, in markets with four or more commercial television stations, which represent the overwhelming majority of U.S. television households, one of the four largest networks will be affiliated with a UHF station. Moreover, the nascent UPN and Warner Brothers networks, like Fox before them, are being built on a base of UHF stations. Thus, any analysis of the networks' affiliation alternatives must encompass all commercial television stations. Under such an analysis, in markets representing the majority of television households nationwide, there are one or more alternative stations to which a network can take its affiliation.^{6/}

13. As Sinclair knows from experience, the threat of loss of a network affiliation is not merely theoretical. In December of last year, following Fox's much-publicized investment in group owner New World Communications Group, Inc. ("New World"), Sinclair's station in Milwaukee, Wisconsin had its Fox affiliation terminated in favor of a station in the market owned by New World. Fox has also announced its intention to terminate its affiliation with Sinclair's Birmingham, Alabama station in September 1996 in favor of affiliation with the New World station in Birmingham. Sinclair's experience is an example not only of the fact that networks will terminate affiliations, but of the fact that group ownership of television stations does little to diminish that threat.

14. For a station facing the loss of its network affiliation, the alternatives are extremely few. Affiliation with another network is the preferable option. However, even in a market where it is possible to affiliate with another network, competition for that affiliation is intense. For instance, when Sinclair lost its Fox affiliation to the New World station in

^{6/} The NPRM suggests that a network's bargaining power could be reduced once local television stations become capable of offering multiple programming channels. See NPRM, para. 15. Sinclair believes, however, that this prospect is far too distant in the future to justify relaxing the remaining network/affiliate rules at this point.

Milwaukee, CBS, which had been affiliated with the New World station, chose to affiliate not with Sinclair's station, but with another UHF station in the market. While Sinclair's station ultimately was able to obtain an affiliation with UPN, that network and the Warner Brothers network are quickly sealing up long-term affiliations with stations in many markets. There is no guarantee that a station whose affiliation is terminated will be able to link with another network.

15. For a network affiliate suddenly rendered an independent, the consequences are severe. The station will find itself having to negotiate its entire schedule, including the critical prime time daypart, on a program-by-program basis -- sharply increasing transactional and programming costs and destroying the cost-effectiveness provided by network affiliation. The few first-run programs that might be feasible alternatives to network programming in terms of popularity are likely already to be tied up in long-term contracts with other stations in the market. What is worse, the station will lose the public identity and resulting goodwill that it has cultivated as an affiliate, severely damaging its ability to attract viewers and advertisers throughout the broadcast day. Thus, while a national network has ample alternatives for affiliation in all but the smallest markets, there is little hope for a displaced local affiliate to sufficiently compensate for the loss of its affiliation.

16. Indeed, the networks have already used their bargaining power over affiliates, combined with prior Commission relaxations of the network/affiliate rules, to the fullest possible advantage. For 44 years, Commission regulations limited the length of a television network affiliation agreement to no longer than two years. This rule promoted affiliate autonomy by preventing an affiliate from being tied for an undue length of time to an affiliation with a network that the affiliate might believe was not providing programming sufficiently responsive to the tastes and interests of its local viewers. The Commission's limitation on the term of TV

network affiliation agreements, however, was repealed in 1989. See Review of Rules and Policies Concerning Network Broadcasting by Television Stations: Elimination or Modification of Section 73.658(c) of the Commission's Rules, 4 FCC Rcd 2755 (1989). Now, networks customarily demand ten-year agreements with their affiliates. A large number of network affiliates are now married to their networks, "for better or worse," for an entire decade. They cannot switch affiliations even at the start of a new license term.

17. Thus, a fundamental programming prerogative of local stations -- the network with which they wish to affiliate -- has already been whittled down to a decision that can be made only once a decade. In addition, network affiliation agreements already generally require the affiliate not only to clear existing network programs, but also to promise to clear programming that the network wishes to run in additional dayparts theretofore unprogrammed by the network. Moreover, while affiliation agreements duly provide that the affiliate may reject network programming on the grounds set forth in the right to reject rule, preemptions on any other grounds are normally cause under the agreement for substantial monetary penalties or termination of the affiliation. By these and other terms -- which networks have been able to impose because of their substantial bargaining power over affiliates -- network affiliation agreements already contain significant constraints on the programming choices of affiliates. The networks simply do not need additional relaxation of the rules that will restrict affiliate freedom even further.

III. The Core Rules Designed to Protect Affiliates' Programming Autonomy from Intrusion by the Networks Should Be Retained Intact

18. The right to reject rule, the time option rule, and the exclusive affiliation rule are the remaining regulations that preserve an affiliate's control over its programming from intrusion by the national television networks. By expressly providing affiliated stations the right to reject network-supplied programming, by prohibiting networks from warehousing blocks of time on affiliated stations for network programming that may or may not be supplied sometime in the future, and by forbidding networks from limiting their affiliates' ability to obtain programming from other networks, each of these rules preserves individual licensees' freedom of programming choice, and furthers the fundamental principle -- rooted in Section 307(b) of the Act -- that it is the nondelegable duty of a licensee to select the programming that it deems most responsive to its local viewership.

19. As shown above, the networks' power to force affiliates to cede away their programming autonomy is just as real now as it was over 50 years ago. Presented with the opportunity, the networks, with their substantial leverage over affiliates, will not hesitate to require that their affiliates clear all network-provided programming, to confiscate large blocks of affiliate time through time optioning, and to force their affiliates not to broadcast programming supplied by another network under any circumstances. Because networks have already used their bargaining power to significantly constrain affiliate freedom, the right to reject rule, the time option rule, and the exclusive affiliation rule are the only rules that remain to protect the autonomy of local television stations as against their affiliated networks. As discussed below, the NPRM's proposals to modify these rules would negate virtually all remaining protection of

affiliate independence, in the process severely undermining the goal of localism that is at the heart of the Communications Act.

**A. The Commission's Proposed "Clarification" of the
Right to Reject Rule Is Unworkable and Contrary to Public Policy**

20. While recognizing that "providing licensees with the right to reject network programming ensures that a licensee has the ability to respond to community needs," the NPRM nonetheless states that

[e]nsuring an affiliate an unlimited right to reject programming provided by a network enables an affiliate to pursue its short-term interests to the possible detriment of the network system within which it participates. An affiliate might reject network programming in favor of more profitable programming for the affiliate, ignoring the fact that its rejection of the network's program causes the network to lose advertising revenues.

NPRM, para. 22. Thus, the Commission proposes to retain the right to reject rule, "but to clarify that the rule may not be invoked based solely on financial considerations." NPRM, para. 25.

21. This proposal presents a number of difficulties. Most fundamentally, it is based on a faulty assumption about the extent to which network affiliates are able to, and do, preempt network programming in favor of "more profitable programming." The reality is, as discussed above, that stations stake much in the way of financial risk and identity in their network affiliations. As a result, while affiliates do sometimes preempt network programming in order to broadcast programs of particular local interest, such preemptions do not occur all that frequently. Preemptions based solely on "profit" happen rarely, if at all, primarily because by committing to a network affiliation, a station in effect has already made a determination that network programming is its most "profitable" alternative. Indeed, at paragraph 48 of the NPRM, the Commission itself questions how often a network's programs are preempted. Moreover, as that

same paragraph points out, network affiliation agreements customarily give the network the right to terminate the affiliation if the affiliate preempts network programs too frequently. For all these reasons, the prospect of affiliates preempting network programming to run “more profitable” programming is far too remote to justify modifying the right to reject rule.

22. Moreover, the Commission’s proposed “clarification” that the rule may not be invoked “based solely on financial considerations” is unworkable. According to the NPRM, this “clarification” means that “profit . . . must not be the sole motive behind preemption.” However, even assuming for the sake of argument that an affiliate wishes to preempt its network schedule solely to air a “more profitable” program, rarely if ever will that affiliate not be able to assert public interest grounds other than profit for its rejection of the network program. Unless the Commission is prepared to conduct lengthy and resource-draining evidentiary hearings in order to discern an affiliate’s true “motive” for preemption, its proposed “clarification” of the right to reject rule is likely to prove incapable of enforcement.

23. Furthermore, the Commission’s proposed “clarification” of the right to reject rule amounts to a proposal for Commission management of private contractual arrangements -- a role that the Commission has repeatedly held it will not play. See, e.g., John L. Runner, Receiver, 36 R.R.2d 773, 778 (1976); Mark R. Nalbene, Receiver, 6 FCC Rcd 7529, 7533 (M.M. Bur. 1991). Assuming that an affiliate desired to reject a network program solely for the sake of “profit,” in most instances this would be a breach of the network affiliation agreement, and as such, it would be dealt with by the parties. There is no reason for the Commission to become involved in being “contract police” for the national television networks, who themselves have advocated deregulation at nearly every turn.

24. In any event, the Commission's proposal essentially seeks to deprive local broadcasters of the ability to make economic decisions concerning their businesses. As such, it is contrary to long-held Commission policy. The Commission has consistently defined "control" of a broadcast station as entailing not merely programming decisions, but financial and personnel decisions as well. See Southwest Texas Public Broadcasting Council, 85 F.C.C.2d 713, 715 (1981) ("Generally, the principal indicia of control . . . are control of policies regarding (a) the finances of the station, (b) personnel matters and (c) programming.") (emphasis added). Thus, even assuming that an affiliate wished to preempt a network program in favor of a more profitable alternative, a rule that forbids such action would confiscate the broadcaster's right to make decisions in one of the most important areas of financial control -- i.e., the programming that would be most economically beneficial to the broadcaster's business. In a nutshell, the Commission's proposed modification of the right to reject rule is premised on a nonexistent threat, unworkable, and contrary to decades of Commission policy and precedent.

B. Permitting Time Optioning, Even Subject to a Predetermined Notice Period, Would Undermine Affiliates' Freedom to Program Their Stations

25. Time optioning allows a television network to essentially "freeze out" blocks of time on its affiliated stations for the network's use -- at its sole option -- to clear future network programming that may not even be in existence at the time the option is entered into. The NPRM acknowledges that the current prohibition on network time optioning "may not pose a significant impediment to established networks." NPRM, para. 30. Thus, the Commission concedes that retention of the time optioning prohibition would not harm established networks. However, largely because the Commission appears to see the prohibition on time optioning as an

impediment to the growth of new networks, the NPRM proposes to eliminate that prohibition and permit time optioning by any network, "subject to a predefined notice period." NPRM, para. 32.

26. Again, however, the Commission's proposal is premised on an overstated concern. It is telling that over the last decade, one national television network (Fox) has developed into a full-fledged competitor to ABC, CBS and NBC, and two more networks (UPN and WB) have emerged -- all with the existing prohibition on time optioning in place. The reason is that new networks do not develop by freezing out blocks of time on local television stations for promised, but as yet undetermined, programming. Instead, new networks grow and develop acceptance among local affiliates by providing a modest amount of specific programming that attains popularity with viewers, then increasing their offerings of such programming, in the process gaining a reputation among local stations for the quality and popularity of their shows. In short, new networks develop based on performance of proven programs, not promises of programs as yet undeveloped, and so time optioning is not necessary for new networks to emerge.

27. Moreover, the Commission's proposal ignores the very serious evils inherent in time optioning. By definition, time optioning allows a network to warehouse blocks of time on its affiliates for programming that may or may not exist, and which may or may not ultimately be broadcast even if it does exist. While the option is in effect, the affiliate is precluded from contracting for any programming other than that which is to be supplied by the network for broadcast in the optioned blocks. As a result, the potential clearly exists for a network to use time optioning not for the purpose of actually developing programs to air in those time periods, but instead merely to preclude its affiliates from obtaining other programming that may be more

desirable, or from dealing with other networks. This is true whether or not time optioning is subject to a predefined notice period. For instance, a network may become aware that a highly-regarded program is being made available for syndication. In order to prevent that program from being cleared by its affiliates, a network may strategically “option” additional blocks of time on its affiliates just before the syndicated program goes on the market, only to give “notice” to its affiliates -- after the syndicated program has been bought by other stations in the market -- that it does not intend to exercise its option.

28. Moreover, permitting time optioning will seriously disrupt the past and future programming arrangements of affiliates. If time optioning is permitted, it is likely that networks will immediately seek to “option” blocks of time for which the affiliate already has purchased other programming. Such other programming might consist of programs of particular interest to the affiliate’s local community, or programming that provides significant local advertising revenue to the affiliate.^{7/} Time optioning therefore would add to the networks’ ability to substitute its own programming for programming that is specifically responsive to local viewers, and would potentially cause serious economic hardship to affiliates. It would also disrupt affiliates’ future programming plans, because even if time optioning is made subject to a notice period between option and broadcast, affiliates would be unable to predict when, and for what time periods, their networks will give notice of a time option.

29. In sum, the Commission’s proposal to allow time optioning is not necessary to the development of new networks. It would, however, create a very real and substantial threat to the

^{7/} Indeed, given the imminent repeal of the prime time access rule (“PTAR”), it is a good bet that one of the first targets of network time optioning, if it is allowed, would be the prime time access hour, which is responsible for a considerable portion of local affiliate advertising revenue.

programming autonomy of local television stations. For these reasons, the prohibition on time optioning should be left intact.

C. The Exclusive Affiliation Rule Should Be Retained in All Markets

30. The exclusive affiliation rule proscribes television network affiliation agreements that prevent the affiliate from broadcasting the programs of another network. The NPRM proposes to eliminate this rule, “at least in large markets.” NPRM, para. 37. The Commission’s hesitance to rescind the exclusive affiliation rule in all markets is premised on its concern “that permitting exclusive affiliation in smaller markets might preclude the development of new networks in those markets,” as such markets generally have fewer stations available for affiliation. While this is certainly true, it is equally true that the rule operates directly to protect a local broadcaster’s autonomy in programming decisions against intrusion by its affiliated network. Just as the right to reject rule guarantees the local licensee’s authority to decide what and what not to broadcast, and just as the time option rule prevents a network from usurping the broadcaster’s right to program all parts of its broadcast schedule, the exclusive affiliation rule prohibits a network from imposing limitations on the licensee’s programming source options. Thus, while the exclusive affiliation rule is important in smaller markets to protect the development of new networks, it is equally important in all markets to preserve the freedom of the licensee to select its own programming from among a maximum array of choices.

31. The Commission’s rationale for proposing elimination of the exclusive affiliation rule in large markets is that

an affiliate can use the audience drawn to the station’s broadcasts by virtue of a network’s programming and promotion of it to build an audience for

programming it finds more profitable, at the network's expense. Permitting exclusive affiliation may reduce some of the concerns associated with the potential for affiliates to use the right to reject rule in this way. Further, identification with a given network through exclusive affiliation may be important to terrestrial broadcast stations attempting to differentiate themselves in an increasingly crowded video marketplace.

NPRM, para. 36.

32. However, as discussed above, in the real world a station has too much invested in its network affiliation to exploit its network in the manner the NPRM envisions. In any event, as discussed above, many network affiliation agreements provide for termination of the affiliation should the affiliate preempt network programs too often. Furthermore, if identification with a particular network is important to an affiliate, it will naturally be in that affiliate's interest not to broadcast programming from another network, and no relaxation of the rules to allow exclusive affiliation provisions is necessary to obtain that result. In the end, eliminating the prohibition on exclusive affiliations not only will stunt new networks' ability to gain a foothold in smaller markets, but in all markets will serve only to facilitate the networks' ability to impose exclusive affiliation provisions upon affiliates who do not wish them. Again, therefore, the Commission's proposal to modify the exclusive affiliation rule is based on perceived benefits that are illusory, and will result in very real public interest detriments.

D. The Dual Network Rule Should Also Be Retained

33. The Commission also seeks further comment on its proposal to eliminate the dual network rule, which generally prohibits a single entity from owning more than one television network. Sinclair believes the dual network rule should be retained, as eliminating the rule would even further expand the networks' substantial leverage over their affiliates. Whatever

small bargaining power an affiliate may possess is likely to be further reduced by the significant possibility that any alternative network with which the station might affiliate is controlled by the same entity. Thus, the Commission should retain the dual network rule as well.

Conclusion

If an entity wishes to provide video programming to a national audience and ensure clearance of all its programming, that entity is free to operate a cable or satellite network.^{8/} The national television broadcast networks, however, have chosen to do business by providing programming to individual licensees throughout the country, each of which has an individual responsibility to serve the needs and interests of its particular community. If the concept of localism that is at the foundation of our national broadcasting system is to be maintained, individual licensees must maintain the freedom to select the programming that will best respond to the particular needs and interests of their local viewers. Using their enormous bargaining power over their affiliates, the networks have already substantially imposed on this freedom. They do not need additional opportunities to do so.

The right to reject rule, the time option rule, and the exclusive affiliation rule are the only regulations that remain to protect the autonomy of local television broadcast stations against intrusion by their affiliated networks. The Commission's present proposals to relax or eliminate these rules in favor of the networks are unnecessary for the maintenance of the network/affiliate system, and will serve only to ensure that national television networks, and not individual station

^{8/} Indeed, just last week the Wall Street Journal reported that the networks are beginning to use satellite technology to split national advertising spots into different versions for different areas of the country -- a technology with the potential to significantly diminish local stations' revenue from national spot sales. See S. Beatty, "Networks are Winning Some Local Ads," Wall St. J., Oct. 27, 1995, at B-5.